

1 CROSS-EXAMINATION

2 BY MR. ROBERTSON:

3 Q Mr. Gounaris, it's my understanding you are a paid
4 consultant for Lawson in this case; is that right?

5 A Yes.

6 Q You've been compensated for providing testimony
7 for Lawson; is that right?

8 A Preparation.

9 Q You also were a paid witness for SAP in the SAP
10 enforcement action, correct?

11 A Yes.

12 Q And isn't it true as of the time that your
13 deposition was taken in this case, about seven months
14 ago, you had already billed Lawson in excess of
15 \$12,000; is that right?

16 A That's correct.

17 Q Since that time you have billed significantly
18 more; is that fair to say?

19 A I billed more.

20 Q In between this case and the SAP case, you have
21 made tens of thousands of dollars from your testimony
22 involving your role with IBM in these cases; is that
23 correct?

24 A Yes.

25 Q You indicated you met with Mr. Melly, who's one of

GOUNARIS - DIRECT

2252

1 the inventors of the patents, you understand that,
2 right?

3 A Yeah.

4 Q Isn't it true that Mr. Melly basically shared with
5 you at the time that Fisher was coming up with this
6 invention that they were spending a significant amount
7 of money and it was a growing amount of money on the
8 production of paper catalogs, thousands of items in
9 it, and they were concerned about that expense and
10 wanted to come up with a method to be able to develop
11 innovation that would give them a competitive
12 advantage and reduce that cost? He was looking for
13 something innovative, wasn't he, sir?

14 A Yes.

15 Q And you indicated that you were going to try and
16 help him in that you had a discussion how you were
17 going to approach that innovation, correct?

18 A Several discussions.

19 Q You indicated, as I say, you were the project
20 manager for this?

21 A No.

22 Q What was your exact title?

23 A I was engagement manager and then became
24 principal. We had another person who was our project
25 manager.

GOUNARIS - DIRECT

2253

1 Q So you understand, in that role, that
2 Fisher-Scientific insisted on a confidentiality
3 agreement or nondisclosure agreement, right?

4 MR. SCHULTZ: Objection, beyond the scope. I
5 never got into any confidentiality agreements.

6 THE COURT: You got into how they were hired
7 and why. Overruled.

8 A There was an exchange of confidential information
9 document, yes.

10 Q You understand in that exchange it was
11 Fisher-Scientific who was providing the confidential
12 information to IBM; isn't that right?

13 MR. SCHULTZ: Objection, cumulative. This is
14 the same testimony we heard from Ms. Eng.

15 THE COURT: Then you shouldn't have called
16 him. Overruled.

17 Q You understand that, right, sir?

18 A Could you repeat again?

19 Q Yes. It was Fisher-Scientific who was providing
20 the confidential information to IBM under that
21 agreement that you signed, right?

22 A That's right.

23 Q You also understand as part of this agreement for
24 IBM to subcontract to assist Fisher-Scientific in this
25 project that there was what's known as a non-compete

GOUNARIS - DIRECT

2254

1 clause? Are you familiar with that term?

2 A I'm familiar with non-compete.

3 Q So everyone understands, you understand a
4 non-compete clause to mean that for some period of
5 time certain individuals are restricted from
6 performing services for a competitor, for example,
7 once they have been hired in this case by
8 Fisher-Scientific, right?

9 A That's correct.

10 Q And in this contract, there was such a non-compete
11 clause, right?

12 A There was.

13 Q And you're aware that you were never identified in
14 that non-compete clause as somebody who was
15 restricted, correct?

16 A Yes.

17 Q Ms. Eng was, right? You're familiar with her?

18 A The names are in the contract. They are written
19 there and who the companies were. It's very spelled
20 out in the contract.

21 MR. ROBERTSON: No further questions. Thank
22 you.

23 THE COURT: Can he be excused permanently?

24 MR. SCHULTZ: Yes, Your Honor.

25 THE COURT: Can he be excused permanently?

1 MR. ROBERTSON: Yes.

2 THE COURT: Thank you, sir, for giving us
3 your testimony, and you're relieved from your
4 obligation to be here. You are excused.

5 (The witness was excused from the witness
6 stand.)

7 THE COURT: We'll take a 20-minute recess at
8 this time.

9 (Brief recess taken.)

10 (The jury is present.)

11 THE COURT: Next witness.

12 MS. HUGHEY: Yes, Your Honor. The next
13 witness is going to be Laurene McEneny. She's the
14 prior art witness for the prior P.O. Writer system.
15 It's going to be a video.

16 THE COURT: Dare I ask the length thereof.

17 MS. HUGHEY: It's 1 hour, 25 minutes. And
18 the designations for your reference, Your Honor,
19 Lawson was able to get it down to --

20 THE COURT: I don't care. I don't think that
21 needs to go there. I understand.

22 Do we have a transcript?

23 MS. HUGHEY: Yes, Your Honor.

24 THE COURT: Okay. All right.

25 THE CLERK: What's her name?

1 MS. HUGHEY: Laurene McEneny, L-a-u-r-e-n-e,
2 McEneny, M-c-E-n-e-n-y. And I can tell you in advance
3 what exhibits will be admitted through the witness, if
4 you'd like.

5 THE COURT: May I have that transcript so I
6 can write my copy on it? What are they?

7 MS. HUGHEY: The exhibits are DX 117, DX 125,
8 DX 126, DX 133, DX 139, DX 140, DX 141, and PX 482.

9 THE COURT: What?

10 THE CLERK: 482, Your Honor.

11 MS. HUGHEY: The last one was PX 482.

12 THE COURT: It was PX, not DX.

13 Ladies and gentlemen, we have some deposition
14 testimony. This is the last deposition, is it, that
15 we have?

16 MS. HUGHEY: Yes, Your Honor.

17 THE COURT: All right. May I see
18 Mr. Robertson and Mr. McDonald up here while you-all
19 are listening to her testimony.

20 (The video is being played at this time for
21 the jury.)

22 THE COURT: Looks to me like from following
23 along at the pace and following along with this
24 there's another 30 minutes or so; is that about right?

25 MS. HUGHEY: Approximately.

1 THE COURT: I think the jury has been here
2 long enough today, and it's probably a good idea to
3 let them go on home, and we'll do this in the morning.

4 Just to give you some idea of what the
5 lawyers think is the status of things, assuming
6 everything goes all right, they plan to have Lawson
7 wrap up tomorrow sometime, and ePlus has about a day
8 of rebuttal testimony. So that means that the
9 evidence ought to be concluded by Thursday. And on
10 Friday you'll hear closing arguments and the final
11 instructions and begin your deliberations.

12 You can deliberate Saturday if you want to.
13 You can go home and spend the weekend. You can come
14 back Monday and deliberate. I'm not telling you how
15 long you have to deliberate. I'm just saying that's
16 what I think will happen.

17 Now, it's possible depending on some rulings
18 that I make that schedule won't be met and they won't
19 wrap up until Friday sometime.

20 Is that a fair statement based on what
21 you-all now think?

22 MR. ROBERTSON: Yes, Your Honor.

23 MR. McDONALD: Yes.

24 THE COURT: They are mindful of the fact,
25 both of them, both sides, that this is a significant

1 imposition upon your time, and your families, and your
2 employers, and they have been working hard even as
3 they have gone along to curtail what they're doing as
4 they see how the evidence is coming in and trying to
5 tailor it to be effective and efficient at the same
6 time.

7 That's what they think now. I think someone
8 had asked what did we foresee, and that's the best I
9 can come up with at this time after consulting with
10 the lawyers.

11 So thank you very much. Drive carefully and
12 we'll see you tomorrow morning at nine o'clock.

13 (The jury is exiting the courtroom for the
14 evening at 5:13 p.m.)

15 THE COURT: All right. Where do you stand on
16 resolving the 167 slides and the testimony and what I
17 have to rule on? Do you know?

18 MR. ROBERTSON: They both haven't actually
19 been downloaded. Progress has been made, but I know
20 that there was substantial progress made, and it's my
21 understanding was several hours have been spent trying
22 to resolve this.

23 THE COURT: Where are they? Where are the
24 resolvers?

25 MR. ROBERTSON: Ms. Stoll-DeBell was one of

1 the resolvers. I hear it's confined itself to the
2 J-CONN and P.O. Writer issues, but we have made
3 substantial headway in resolving most of the other
4 issues.

5 So I think we can treat them not slide by
6 slide, but perhaps my catagory, but I haven't had an
7 opportunity to speak with my colleague with respect to
8 that.

9 THE COURT: Neither one of you have.

10 MR. McDONALD: I think, conceptually, I'm
11 going to try to keep the P.O. Writer and J-CONN stuff,
12 try to tailor it out a little bit tonight. So to the
13 extent there are issues, I can turn it into non-issues
14 and focus on the RIMS and TV/2.

15 It sounds like that's been generally
16 resolved.

17 THE COURT: All right. Do you have one other
18 person, a fact witness? Who is it?

19 MR. McDONALD: Yes, it's Preston Staats. He
20 is the witness regarding the J-CONN prior art.

21 MR. ROBERTSON: You also have my inventor.

22 MR. McDONALD: Yes, Mr. Johnson.

23 THE COURT: Will Johnson be longer or shorter
24 than the others?

25 MR. McDONALD: He'll be shorter. Just a

1 little cleanup, not repeating. It's my goal to not
2 repeat what the other inventors have said.

3 MR. ROBERTSON: I wanted to raise two matters
4 with you. Let me bring it to your attention. One is
5 we have revised the glossary to include your
6 definition or your construction or your supplemental
7 construction on published by a vendor. I've done it
8 two ways.

9 One, I put it in a glossary of terms, or,
10 two, I've just done it as an additional supplemental
11 instruction that could go behind the glossary of
12 terms. I'm going to give a copy to Mr. McDonald
13 tonight, and I might just make a suggestion that that
14 might be helpful to have in the jurors' notebooks
15 since the Court has now construed that claim.

16 THE COURT: My practice is to give the jury
17 the instructions. I've taken your instructions. I've
18 tried to simplify them, basically, by eliminating
19 repetition.

20 If you'll look at the instructions, there was
21 a great deal of repetition because a lot of standard
22 instructions were used without clipping out the things
23 that were repeated in others. And I will review those
24 again tonight after they have been retyped, I think,
25 and I'll get them to you.

1 MR. ROBERTSON: May I just raise one second
2 issue, Your Honor, and that is what is the Court's
3 pleasure with respect to when you want to argue these
4 things or hear argument or --

5 THE COURT: As soon as the evidence is in. I
6 don't think it's fair to argue instructions before the
7 evidence is in because it just changes. And you have
8 to redo things so much. We'll do it as soon as the
9 evidence is in.

10 MR. ROBERTSON: Did I understand Your Honor
11 was going to provide a draft at some point in the next
12 day or two so we can focus on what's important and
13 maybe even resolve any differences?

14 THE COURT: Yes, I hope I'll give it to you
15 sometime tomorrow. I have to read it again. I have
16 taken what have you done and spent, with the help of
17 Ms. Haggard, reorganizing them. I've tried to put
18 them together in a way that the jury can understand.

19 I have edited them to some extent, but
20 basically to take out redundant information. I think
21 I've tossed three or four of them or maybe more
22 because I didn't think they belonged, but I have all
23 of what you-all have tendered available for the charge
24 conference, and we'll have the charge conference after
25 the evidence is in.

1 And then you'll be able to -- the procedure
2 is you don't have to stand up and deal with things.
3 You can sit down, but you have to speak up so the
4 court reporter can hear you because you probably have
5 lots of paper that you need to look at. Then we'll go
6 from there.

7 I have looked at these proposed curative
8 instructions on the issue of advice of counsel. And
9 my view is it's better to be simple than complicated,
10 and I believe that I'll just tell them that when
11 Mr. Christopherson testified, there was some testimony
12 about whether he or other lay witnesses at Lawson
13 formed a viewpoint about whether Lawson infringed the
14 patents or whether Lawson obtained an opinion of
15 counsel of non-infringement or invalidity of the
16 patents.

17 I instruct you now that I have excluded all
18 that testimony. I'm asking you to disregard it
19 entirely. Obviously, that will be the subject of the
20 charge conference, but it is essentially the first
21 paragraph of Lawson's -- I mean of ePlus' proposal,
22 and the second paragraph added to it with the rest of
23 it stricken out. It's not essentially. That is what
24 it is.

25 I don't think it's wise to get into telling

1 the jurors legal theory. I think the important thing
2 is to do what I told them will happen at the beginning
3 of the case, and that is if there's something that has
4 to be stricken, you can't consider it. Otherwise, I
5 think you put too much focus on the issue and that
6 raises more questions often than it answers. So
7 that's what I propose to do with that.

8 And plaintiff ePlus' brief or motion to
9 preclude evidence or argument of non-infringement due
10 to defendants failure to provide discovery related to
11 customer specific implementations of accused products
12 should be denied as moot, should it not?

13 MR. ROBERTSON: Based on Mr. McDonald's
14 representation of stipulation, I think that is
15 correct, Your Honor.

16 THE COURT: I've held it, but I haven't heard
17 anything that causes me to deal with it yet. Unless
18 something happens tomorrow making me have to deal with
19 it, that's what I propose to do.

20 I have received and read Lawson's memorandum
21 in opposition to the offer of proof question. I will
22 give ePlus -- this was filed yesterday at sometime.
23 I'll give ePlus a chance to respond to it.

24 Let me tell you just what I'm concerned
25 about. I think that you're entitled to make an offer

1 of proof about what you presented to me inveighing me
2 to make a decision. I don't think you're entitled to
3 include in that offer of proof matters that I didn't
4 consider because -- I mean, it may have changed my
5 mind. I don't know. I haven't looked at them at all
6 at this point.

7 And I understand from Lawson's brief that
8 there are a lot of things that were offered that are
9 new. There was a fairly extensive proffer made in the
10 argument, if I remember correctly, and so that's kind
11 of the consideration that I have.

12 However, even if that prompts a decision to
13 deny the motion for leave to file, I think it's
14 obligatory on the Court to allow that to be placed in
15 the record in its entirety so that the Court of
16 Appeals can conclude whether I erred.

17 The two or three cases that Lawson cited that
18 seem to address that situation looked to me as if that
19 was the procedure followed by the District Court, but
20 I do think that the underlying issue, both here and
21 perhaps more importantly on appeal, is that items that
22 weren't presented to the District Court for decision,
23 it might have an import on the ruling made that can't
24 be considered on appeal, at least in the Fourth
25 Circuit they can't, and I think the Federal Circuit

1 follows pretty much the same rule.

2 MR. ROBERTSON: Your Honor, could I just
3 request then, it really doesn't have any impact on the
4 jury. Could we have until Friday to file that reply?

5 THE COURT: Sure. You've made it in a timely
6 fashion. And you-all have enough to do without
7 generating more paper, but I thought I had it, I've
8 read it, and I'd let you know where we stand on the
9 matter, and then we'll go from there.

10 MR. ROBERTSON: Thank you.

11 THE COURT: All right. Is there anything
12 else that we need to take up this evening?

13 MR. McDONALD: No, Your Honor.

14 MR. ROBERTSON: I'm sorry?

15 THE COURT: Anything else you all need to
16 take up?

17 MR. ROBERTSON: No, sir.

18 THE COURT: Are you all in agreement on the
19 verdict form because I'm reviewing it, and I know
20 there were some complaints about it at one time,
21 differences of opinion at one time, and I don't know
22 whether you've resolved it or not.

23 MR. McDONALD: I think the main issue was
24 whether we were going to have the different Lawson's
25 systems on the infringement issue.

1 THE COURT: What?

2 MR. McDONALD: I think the main issue was
3 whether we were going to ask on an accused system
4 basis because certain others, about five or six Lawson
5 --

6 THE COURT: Five. I think there were five
7 combos.

8 MR. McDONALD: Right. Some were accused of
9 certain things and not others.

10 THE COURT: Yes. Because right at the end of
11 Dr. Weaver's testimony I believe that Mr. Robertson
12 went through and kind of identified which claims
13 involved all of the systems, which claims involved
14 only certain parts of the system, and Dr. Weaver was
15 very specific about that. And I'm inclined at this
16 stage, in particular, because I think you-all are
17 entitled to know what the verdict form is.

18 MR. ROBERTSON: Yes, Your Honor.

19 THE COURT: As the case was tried. Plus I
20 think the Court needs to have that answer in deciding
21 how to frame any injunctive relief that may ensue a
22 verdict in favor of the plaintiff.

23 MR. ROBERTSON: We've gone ahead and prepared
24 another draft based on the configurations that were
25 subject of the testimony and as to which claims those

1 configurations would apply.

2 So I have a draft. I can go back and check
3 on it tonight, and I'll provide it to Mr. McDonald for
4 his review, and see if he can agree with it, or if he
5 doesn't, if he has any further suggestions.

6 THE COURT: All right. And then do you ask
7 judgment -- I believe you just said is the patent
8 valid after each one of the questions of infringement
9 in the first iteration of that form. Is that what
10 you've done, too, following?

11 MR. ROBERTSON: With respect to that, I think
12 we have a suggestion after that. For example, they
13 are going to be finding obviousness or anticipation
14 based on a reference. We now have a question, what
15 reference or references do you find invalidate the
16 claims? So it's also specific as to the prior art.
17 That is, the jury so finds we invalidate one or more
18 claims.

19 But I'll be happy to provide a copy of it to
20 the Court just to review, not filing it with the
21 clerk's office until we have an opportunity --

22 THE COURT: Yes, I think that's fine. You
23 two look at it and then see what you think, and then
24 give it to me.

25 I'm inclined not to tie them in very tightly

1 on which references just because it's burdensome.

2 MR. McDONALD: It's going to be an awful long
3 form if you put in each one of the individual pieces
4 of prior art.

5 It's already long as it is. That will make
6 it longer than I think it needs to be is my first
7 reaction, but we'll take a look at what he proposes.
8 I don't want to take a position sight unseen.

9 THE COURT: No, I don't either.

10 Did I tell them nine in the morning.

11 THE CLERK: I believe you did.

12 THE COURT: Thank you.

13 MR. McDONALD: Your Honor, the closing
14 arguments, I have a question about that. I would
15 assume the normal order would be that the plaintiff
16 goes first, the defendant second, and then plaintiff
17 rebuts, is that regular? My question is because we
18 have the burden of proof on invalidity, would there be
19 an opportunity -- some courts give the defendant who
20 has that burden to prove invalidity a chance to rebut
21 on that issue.

22 THE COURT: Have you all talked about that?

23 MR. McDONALD: No, I was wondering if you had
24 a procedure that was typical in a situation like this.

25 THE COURT: Typically, it's an opening and

1 closing and a rebuttal by plaintiff.

2 MR. ROBERTSON: That's how it was handled in
3 *Ariba* and *SAP*, Your Honor, before Judge Brinkema and
4 Judge Spencer.

5 THE COURT: I think he wants to -- do you
6 want to handle it like they do in Minnesota?

7 Do you know what that is, Mr. Robertson?

8 MR. ROBERTSON: Your Honor --

9 THE COURT: The defendant goes first, and
10 then the plaintiff goes last, and that's the end of
11 it. There isn't any other that I know of.

12 Do they still do that?

13 MR. McDONALD: Yes.

14 MR. ROBERTSON: There is no counterclaim
15 pending, Your Honor. It is on the affirmative
16 defense.

17 THE COURT: I understand. And my reaction
18 is, you use the standard format. And I generally
19 don't put time limits on lawyers. I do think if
20 you're going to be using demonstrative exhibits in
21 your closings that you need to show them to the other
22 side so that I don't have a big problem at some point.

23 I mean, if they have previously been dealt
24 with and used at the trial, you don't need to do that,
25 but if you're going to use something that you haven't

1 used before, I think it's a good idea to let the other
2 side see basically what you're doing.

3 MR. McDONALD: Okay, Your Honor.

4 THE COURT: But maybe you all have a
5 convention on that, too? I know the world of bridge
6 has passed me by because all the conventions have
7 changed, and now I feel like I've been changed by your
8 conventions.

9 MR. ROBERTSON: I have one question with
10 respect to these demonstratives. There's been some
11 testimony in the case that we would like to obviously
12 emphasize. There's been testimony, I'm sure, that
13 Lawson would like to emphasize.

14 Does the Court have any prohibition of
15 including a Q and A, for example, from the transcript?

16 THE COURT: No, you can both do that if you
17 want to. I think that's helpful to the jury.

18 The one question that you must give some
19 thought to, and it's tended to crop up more frequently
20 recently than it used to, and that is the jurors get
21 back there and they start deliberating, and they want
22 to know if they can have the demonstratives or some of
23 them. And you just better get prepared for that.

24 I think it's an epidemic, even though I've
25 told them they are not admitted. But it's happened a

2271

1 lot. It tends to happen more in criminal cases than
2 others.

3 All right. Is there anything else? Thank
4 you very much.

5

6 (The proceedings were adjourned at 5:30 a.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25